IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 615

HOUSEHOLD GOODS CARRIERS' BUREAU, ET AL.,
Appellants,

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees.*

On Appeal From the United States District Court for the Northern District of California

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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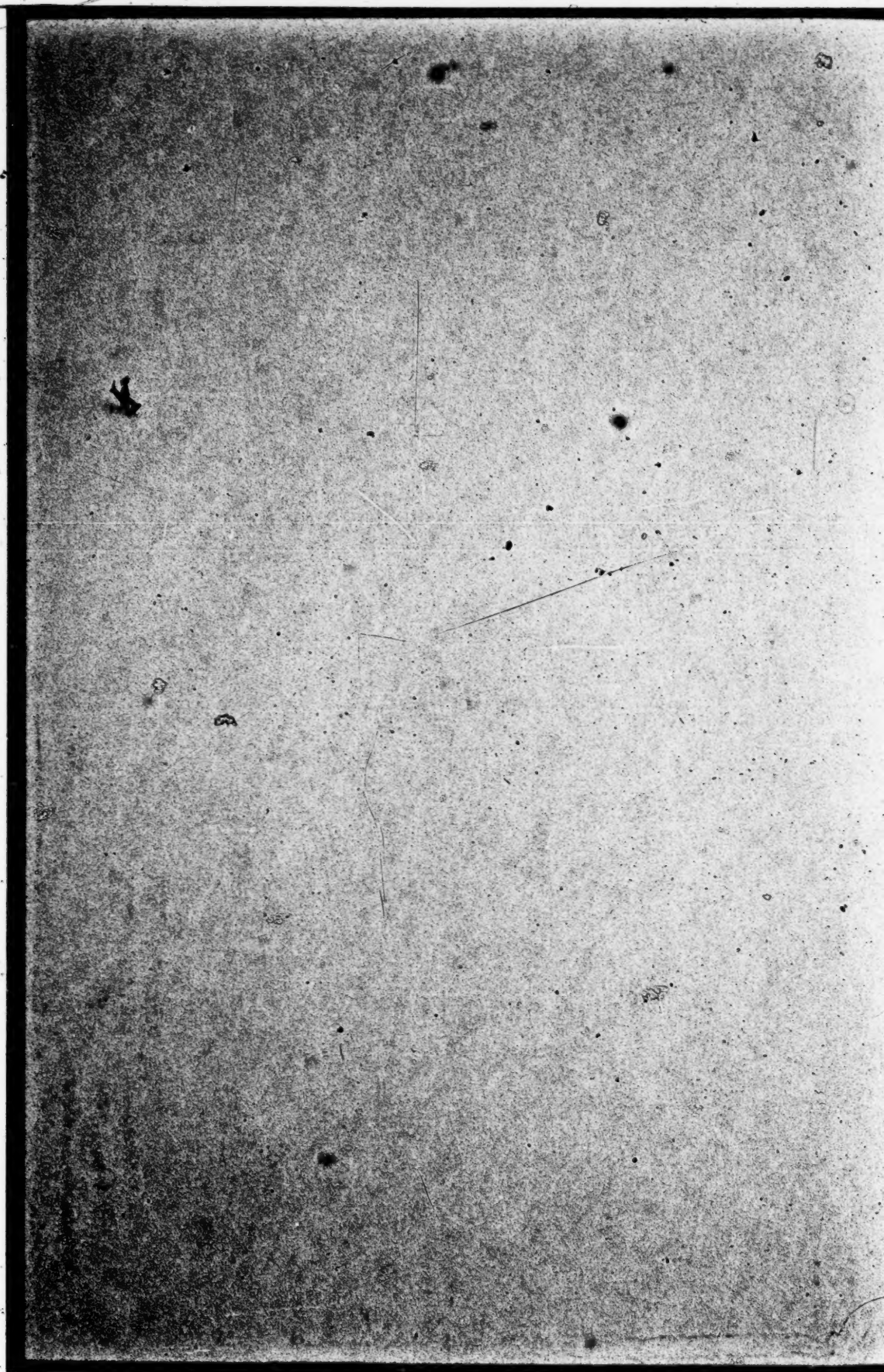

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BRIEF IN OPPOSITION TO MOTION TO AFFIRM

As permitted by Rule 16(4) of the Rules of this Court, appellants respectfully submit their brief in reply to the motions to affirm which were filed by United States of America and the Interstate Commerce Commission, hereinafter called the Government, and by the Household Goods Forwarders Association of America, Inc., et al., intervening defendants.

REPLY TO THE GOVERNMENT

The Government urges that two or more forwarders, each with one shipment, can satisfy the statutory test of forwarding by "joint-loading" because the public will otherwise be denied the benefits of the containerized movement of household goods or the transportation thereof will be subjected to unnecessary delays. The Government's position is based on the mistaken concept that the unregulated forwarders were the originators of the containerized method of transporting household goods and perform the great bulk of such transportation. The facts are otherwise.

In *City Transfer & Storage Co. Extension—California,* 17 M.C.C. 7 (1939), decided by the Commission almost three decades ago, the early efforts of motor carriers to make use of the container method of transporting household goods was discussed. The unregulated forwarders have merely adapted an old and well known system to the overseas movements. They have not, however, monopolized the field. The household goods carriers have continued to utilize that method and transport at least a majority of the movements for the Department of Defense. (J.S. 14a-16a)

The basic vice of the Government's argument here and that of the Commission in its *Kingpak* decision is the failure to distinguish between the operations of the unregulated forwarders and the container service offered by the motor carriers of household goods. Under the latter arrangement the household goods carriers tender the loaded containers to the railroads or the general commodity motor carriers for line-haul movement in substitution for line haul by their own facilities. In so doing the household goods carriers retain all the

attributes of common carriers and, moreover, further the goals of the national transportation policy by coordinating their operations with those of other carriers, all as approved and encouraged by this Court in *American Trucking Assos.* v. *A. T. & S. F. R. Co.*, 387 U.S. 397 (1967). Appellants cannot agree, therefore, that the Commission has enunciated "a reasonable basis in law" for its new and startling holding that an entrepreneur who never has enough traffic of his own to consolidate can still qualify as a forwarder under Part IV of the Interstate Commerce Act. Rather, we think the Commission has laid the basis in this case for the virtual destruction of regulation of the transportation of household goods—transportation which the Commission itself found is of great significance in the national transportation picture. (J.S. 13a)

The second argument by the Government is that an agency which "performs" the assembly movement of a shipment to a port and there affects consolidation of it with other shipments, either at the port itself or aboard ship, satisfies the statutory definition of a forwarder. The Government cited *Porter Co.* v. *Central Vermont Ry.*, 366 U.S. 272 (1961), in support.

In the cited case, the only transportation involved was the physical performance of carriage by a railroad. The holding was that the portion of the physical movement which takes place within the United States is subject to regulation. The argument of the Government fails to note that forwarding does not involve physical carriage by the forwarder. It follows, therefore, that only the entire function of forwarding, i.e., forwarding from origin to destination, can be regulated. Laying to one side the exemption feature which somewhat

complicates the situation here, the doctrine espoused by the Government would in the case of forwarders subject to the Act[1] oust the Commission from its jurisdiction to regulate the assembly movement. This is by reason of the provisions of Section 409 of the Interstate Commerce Act [49 U.S.C. § 1009] which was amended to its present form to escape the impact of this Court's decision in *United States* v. *Chicago Heights Trucking Co.*, 310 U.S. 344 (1940). Section 409 permits contractual arrangements between regulated forwarders and motor carriers for not only the assembly movements but also much of the line haul. The Commission jurisdiction over such contracts is minimal.

The Government urges that the guidelines in the Commission's *Kingpak* decision constitute an adequate discharge of the Commission's obligation because they operate prospectively and therefore would render moot any cease or desist order. Yet in its *Kingpak* decision the Commission itself commented that they are not regulations and compliance with them is not mandatory. (J.S. 28a) Assumedly appellants could in the future bring a complaint before the Commission when in possession of evidence that there has been no compliance with the guidelines and, if the Court below is correct, the Commission could again avoid the necessity for acting on the complaint by issuing new or more detailed guidelines. Surely performance of its regulatory function by the Commission calls for something more than has been done in the *Kingpak* case.

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[1] By its decision in *Routed Thru-Pac, Inc., Freight Forwarder Application*, 332 I.C.C. 352 (1968), the Commission would grant regulated forwarder status to forwarders of household goods.

Finally, the Government avoids confrontation on the Commission's announced adoption of a no-hearing procedure for the local carrier applications by urging that the doctrine is not to be universally applied and that until there has been a direct injury from it, no cause exists for reviewing the Commission's pronouncement. Yet a fair reading of the Commission's own language is that there is to be no hearing when requested by a protestant and that, in any event, the result is foreordained. (J.S. 48a) Moreover, while the Commission found that "an application for operating authority could not ultimately be denied without giving the applicant an opportunity to be heard", it could be granted without giving a protestant an opportunity to be heard. (J.S. 44a) Appellants believe that no such interpretation of the statute can be reasonable.

REPLY TO THE INTERVENING DEFENDANTS

All but one of the arguments advanced by the intervening defendants are fully answered by the foregoing answer to the Government's motion. It is said, however, that appellants have not distinguished the Commission's decisions which assertedly support the *Kingpak* decision. There are two lines of such cases, the first relating to joint loading and the second to operations across an international boundary.

Neither line of cases is apposite here. In no case heretofore has the Commission ever held that two or more aspirants to forwarder status, each with a single shipment, can satisfy the statutory test by joint loading. In no case heretofore has the Commission ever held that mere assembly movement to and across an international boundary is adequate to support a claim to forwarder status.

CONCLUSION

The case is important. It merits plenary review.

Respectfully submitted,

HOUSEHOLD GOODS CARRIERS' BUREA
ALLIED VAN LINES, INC.
NORTH AMERICAN VAN LINES, INC.
BERT HUSSEY, d/b/a HUSSEY'S
A. L. CHIPMAN, d/b/a GOODWIN MOVING AND STORAGE CO.
UNITED CALIFORNIA EXPRESS AND STORAGE CO., d/b/a U. C. EXPRES AND STORAGE CO., and
VON DER AHE VAN SERVICES, INC., d/b/a BENTLEY'S, INC.

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